No. 85704

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

BILLY LYNN BLOCKER,

Appellant.

Appeal from the Circuit Court of Iron County, Missouri
The Honorable J. Max Price, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

JURISDICTIONAL STATEMENT

This appeal is from a conviction for possession of a controlled substance, §195.202, RSMo 2000, obtained in the Circuit Court of Iron County, for which appellant was sentenced to ten years imprisonment. This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. On December 23, 2003, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this Court now has jurisdiction of this appeal pursuant to Article V, §10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Billy Blocker, was charged by amended information as a prior and persistent offender with possession of a controlled substance (LF 11-12). On February 11, 2002, this cause went to trial before a jury in the Circuit Court of Iron County, the Honorable Max Price presiding (LF 4, 5).

Appellant does not challenge the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence adduced at trial showed the following:

At about 11:15 a.m. on September 25, 1999, Corporal Michael Carson of the Missouri Highway Patrol was on duty, driving southbound on U.S. 67 near Silva, Missouri (Tr. 163-164). Cpl. Carson saw a white car sitting still on the highway in the northbound lane (Tr. 165). Cpl. Carson saw the driver and the front seat passenger get out of the car and switch places (Tr. 165). Cpl. Carson turned his car around, activated his emergency equipment, and stopped the vehicle as it began to pull away (Tr. 165, 166).

Cpl. Carson contacted the driver, Cary Ray, and asked why they had stopped in the roadway (Tr. 166). Cpl. Carson also asked both Ray and the passenger, later identified as appellant, for identification (Tr. 166). Appellant was able to produce identification, but Ray was not, so Cpl. Carson asked Ray to exit the car and come back to Carson's patrol vehicle (Tr. 167). Ray initially gave a false name but finally admitted

that his real name was Cary Ray (Tr. 167). Cpl. Carson determined that Ray had an outstanding warrant and so Cpl. Carson placed Ray under arrest (Tr. 168). Russell Duckworth, a conservation agent, saw Cpl. Carson stop the vehicle, and Duckworth stopped to see if Carson needed any assistance (Tr. 194).

After searching Ray, Cpl. Carson returned to appellant's vehicle (Tr. 169). Appellant was seated in the front passenger seat (Tr. 170). Cpl. Carson asked him for permission to search the vehicle (Tr. 170, 196). Appellant consented (Tr. 170, 197). Cpl. Carson asked appellant to exit the vehicle and asked appellant to empty his pockets (Tr. 170). Appellant pulled the insides of his pockets out and Cpl. Carson patted him down (Tr. 197). In appellant's right front pants pocket was a small pinkish-orangish tablet (Tr. 170-171, 197, 198). Cpl. Carson asked appellant what the tablet was (Tr. 175). Appellant said that it was Xanax and that his grandmother had given it to his brother, Carl Ray, and that when he saw Ray being arrested, appellant took it out of Ray's cigarette pack and put it in his pocket (Tr. 175, 198).

Cpl. Carson handcuffed appellant, finished the vehicle search, and then read appellant his ***Miranda*** rights and took him to the sheriff's department (Tr. 176). Later laboratory tests determined that the tablet was diazepam, a Schedule IV controlled substance (Tr. 186, 187).

Appellant testified in his own defense. Appellant claimed that he lived with his grandparents, Dan and Alice Ellis (Tr. 207). Appellant asserted that he was taking his

brother, Cary Ray, from their grandparents' house to Hillsboro, Missouri (Tr. 209). Appellant said that he was driving, but then his brother asked if he could drive, so appellant, not seeing any traffic, stopped in the middle of the roadway to make the switch (Tr. 210). Appellant claimed that when he saw Cpl. Carson arrest his brother, he knew that Cary had prior drug offenses, so to keep his brother from getting in any more trouble, appellant took the pill out of his brother's cigarette pack and put it in his pocket (Tr. 212). Appellant said that his grandmother had given the pill to Cary before they left, in order to calm Cary's nerves (Tr. 213). Appellant's sister also testified, confirming that appellant lived with his grandparents (Tr. 221).

At the close of evidence, instructions, and argument by counsel, the jury found appellant guilty (LF 4, 5, 22; Tr. 251). The trial court found appellant to be a prior and persistent offender (Tr. 39, 41). The trial court sentenced appellant to ten years in the Department of Corrections (LF 4, 6, 27-28; Tr. 264-265). The Missouri Court of Appeals, Southern District, affirmed appellant's conviction and sentence. ***State v. Blocker***, No. SD25003 (Mo.App.S.D., October 28, 2003). The Court of Appeals denied appellant's motion for rehearing on November 19, 2003. On December 23, 2003, pursuant to Supreme Court Rules 30.27 and 83.04, this Court granted appellant's motion to transfer the case to this Court.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN ADMITTING STATE'S EXHIBIT 1, THE DIAZEPAM PILL SEIZED FROM APPELLANT, BECAUSE THE PILL WAS NOT IMPROPERLY SEIZED IN THAT APPELLANT'S VEHICLE WAS LAWFULLY STOPPED FOR A TRAFFIC VIOLATION, APPELLANT WAS NOT IMPERMISSIBLY DETAINED BEYOND THE PURPOSE OF THE STOP, AND APPELLANT CONSENTED TO A SEARCH OF THE CAR AND CONSENTED TO EMPTY HIS POCKETS WHEN ASKED BY THE OFFICER.

EVEN IF THE SEARCH WERE SOMEHOW ILLEGAL, APPELLANT IS NOT ENTITLED TO RELIEF BECAUSE EVEN WITHOUT THE PILL, THERE WAS OVERWHELMING EVIDENCE OF APPELLANT'S GUILT AND THE PILL APPELLANT SOUGHT TO SUPPRESS WAS MERELY CUMULATIVE TO THAT EVIDENCE (In response to appellant's Points I and II).

Appellant contends that the trial court should not have admitted the diazepam pill which had been found in appellant's pockets because it was the result of an illegal nonconsensual search (App.Br. 14).

A. Standard of review.

Review of a trial court's ruling on a motion to suppress is limited to determining whether the evidence is sufficient to support the trial court's ruling. ***State v. Carter***, 955 S.W.2d 548, 560 (Mo.banc 1997). This Court views the facts and any reasonable

inferences therefrom in a light most favorable to the ruling of the trial court and disregards any contrary evidence and inferences. ***Id.*** As long as the trial court's ruling is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. ***State v. Day,*** 87 S.W.3d 51, 56 (Mo.App.S.D. 2002). The credibility of witnesses and the weight of the evidence are matters to be resolved by the trial court. ***State v. Perrone***, 872 S.W.2d 519, 521 (Mo.App. S.D. 1994). The reviewing court may consider both the record made at the pre-trial hearing and the record made at trial. ***State v. Edwards***, 116 S.W.3d 511, 530 (Mo.banc 2003).

B. Facts.

Viewed in the light most favorable to the trial court's ruling, the evidence adduced at the motion to suppress hearing and at trial showed the following:

Cpl. Mike Carson of the Missouri Highway Patrol was on duty, traveling southbound on U.S. 67, just south of Silva, Missouri, at approximately 11:15 a.m. (Tr. 4, 163-164). About 2 ½ miles north of Greenville, Missouri, Cpl. Carson saw a small white Buick stopped in the northbound traffic lane (Tr. 5, 165). Cpl. Carson was concerned because U.S. 67 was a fairly busy highway and the vehicle was not pulled over to the side of the road (Tr. 5-6 Cpl. Carson saw appellant in the driver's side of the vehicle (Tr. 6). Appellant got out and a white male exited the vehicle on the passenger side, and the two walked around the car and swapped seats (Tr. 6, 165). Appellant and the other person,

later identified as appellant's brother, started the vehicle and continued down the highway about 100-200 yards before Cpl. Carson, who had turned around, pulled them over (Tr. 6-7, 165). Cpl. Carson was in a fully marked patrol vehicle and had activated his emergency equipment in order to effectuate the stop (Tr. 7, 166).

Cpl. Carson approached the vehicle on the driver's side and asked both the driver and appellant for some identification (Tr. 7, 166). Carson also asked why they had stopped in the roadway (Tr. 7, 166). Appellant produced a Missouri driver's license, but his brother had no identification on him (Tr. 8, 167). Carson asked appellant's brother for his name and date of birth and asked him to come back to Carson's patrol car (Tr. 8, 167). Appellant remained in the Buick which was now pulled over on the shoulder (Tr. 9).

Appellant's brother initially falsely identified himself, but then acknowledged that his real name was Cary Ray (Tr. 8, 167). Cpl. Carson ran a computer check and determined that Ray had an outstanding felony warrant from St. Francois County (Tr. 9, 168). Cpl. Carson placed Ray under arrest and conducted a search of Ray incident to that arrest (Tr. 9, 168). Shortly thereafter, Russell Duckworth, a conservation agent, saw Cpl. Carson stop the vehicle, and Duckworth stopped to see if Carson needed any assistance (Tr. 194).

Cpl. Carson then spoke with appellant again (Tr. 9, 168). Appellant was still seated in the front passenger seat (Tr. 170). Cpl. Carson told appellant that Ray was

under arrest and then asked appellant for consent to search the vehicle (Tr. 10, 170, 196). Appellant said he could (Tr. 10, 170, 197). Carson asked appellant to step out of the vehicle for safety reasons (Tr. 10, 170). Carson asked appellant to empty his pockets (Tr. 10, 170). Appellant did so and produced a small pinkish-orange tablet from his right front pants pocket (Tr. 11, 29, 170-171, 197, 198). Carson asked appellant what it was and appellant said he believed it was Xanax, that it belonged to his grandmother, and that she had given it to Ray earlier that day (Tr. 12, 175, 198). Appellant said that he knew his brother was in trouble when he was placed under arrest and that the pill was in his brother's cigarette pack (Tr. 12-13, 175, 198). Appellant said he took it out of the cigarette pack to hide it (Tr. 13, 175, 198).

Cpl. Carson secured appellant and then searched the vehicle (Tr. 13, 176). A propane cylinder with bluish green valves was found in the trunk (Tr. 13). Cpl. Carson then placed appellant under arrest, gave him his ***Miranda*** warnings, and asked him about the gas cylinder (Tr. 15, 176).

C. Admissibility of evidence.

Appellant first asserts that Cpl. Carson's stop of his vehicle was an illegal stop (App.Br. 16). Appellant contends that he did nothing illegal by stopping his vehicle in the middle of the traffic lane of U.S. Highway 67 (App.Br. 16-17). Appellant acknowledges that Cpl. Carson testified that "if a vehicle is going to stop it needs to stop

as far right to the shoulder as possible, or on the shoulder." (App.Br. 16-17, citing Tr. 6). Appellant says he cannot find any such law (App.Br. 17).

Section 304.015.1, RSMo 2000, states, in pertinent part, as follows:

> All vehicles not in motion shall be placed with their right side as near the right-hand side of the highway as practicable

Section 304.015.7, RSMo 2000, states, in pertinent part, as follows:

> Violation of this section shall be deemed an infraction unless such violation causes an immediate threat of an accident, in which case such violation shall be deemed a class C misdemeanor, or unless an accident results from such violation, in which case such violation shall be deemed a class A misdemeanor.

Furthermore, §304.012, RSMo 2000 states that every person operating a motor vehicle shall drive the vehicle in a careful and prudent manner and shall exercise the highest degree of care and that failure to do so constitutes a misdemeanor.

Appellant, in stopping his car in the middle of the northbound traffic lane of the highway, did not place his car with the right side as near the right-hand side of the highway as practicable. Nor was he operating his vehicle in a careful and prudent manner and exercising the highest degree of care. Thus, he did violate the law. The fact that he was pulling away when Cpl. Carson stopped him does not remedy the fact that

appellant violated §304.015.1 and §304.012 when appellant stopped the car in the middle of the traffic lane in the first place.

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) holds that a police officer may briefly stop someone when the officer has a reasonable suspicion, based upon specific and articulable facts, that the person has or is engaged in criminal activity. "Reasonable suspicion of criminal activity includes reasonable suspicion of a traffic violation." ***State v. England***, 92 S.W.3d 335, 339 (Mo.App.W.D. 2002). "'If an officer has an articulable suspicion that the driver of a vehicle is committing, or has committed, a traffic violation, there is sufficient basis for a ***Terry*** stop of the vehicle.'" ***Id.,*** *quoting* ***State v. Taber***, 773 S.W.3d 699, 705 (Mo.App.W.D. 2002). "A routine traffic stop based upon the violation of state traffic laws is a justifiable seizure under the Fourth Amendment." ***England, supra***, *quoting* ***State v. Woolfolk***, 3 S.W.3d 823, 828 (Mo.App.W.D. 1999).

In the present case, appellant violated a traffic law. Cpl. Carson, having observed appellant stopped in the middle of the northbound traffic lane of the highway, had an articulable suspicion that appellant had committed a traffic violation. Cpl. Carson's stop of the vehicle was thus permissible.

Appellant next asserts that there was a "continued unconstitutional seizure" of appellant after the stop (App.Br. 20). Appellant asserts that he was not free to leave, but

the purpose of the stop had been completed and there was no longer a justification to hold him (App.Br. 20).

While a detention for a traffic violation is permissible, as discussed above, any detention beyond that required for a normal traffic stop is unreasonable unless there is reasonable suspicion of unlawful activity. ***State v. Scott***, 926 S.W.2d 864, 868 (Mo.App. S.D. 1996). However, further questioning following the conclusion of the stop is allowed if the encounter turns into a consensual one. ***Id.***

"A consensual search following such a traffic stop is not prohibited by the Fourth and Fourteenth Amendments if the consent to search is given freely and voluntarily." ***State v. Burkhardt***, 795 S.W.2d 399, 404 (Mo. banc 1990); ***See also Ohio v. Robinette***, 519 U.S. 33, 117 S.Ct. 417, 421, 136 L.Ed.2d 347 (1996) (defendant consented to search after received warning for speeding and his driver's license had been handed back to him). An exception to the warrant requirement of the Fourth Amendment provides that a search may be conducted with the consent of the person searched. ***State v. Engel***, 859 S.W.2d 822, 826 (Mo. App. W.D. 1993); ***State v. Robinson***, 789 S.W.2d 876, 880 (Mo. App. S.D. 1990); ***see also State v. Hyland***, 840 S.W.2d 219, 221 (Mo. banc 1992). "[I]t is not necessary for there to be probable cause to believe that a vehicle contains contraband before an officer is authorized to request permission to search." ***State v. Scott***, 926 S.W.2d 864, 868 (Mo.App. S.D. 1996). "An officer may, at any time ask a

citizen if he has contraband in his car and ask for permission to search." ***State v. Day***, 900 S.W.2d 656, 659 (Mo.App. S.D. 1995).

A consent to search is valid so long as it is freely and voluntarily given, and is not the "product of duress or coercion, express or implied." ***State v. Bunts***, 867 S.W.2d 277, 281 (Mo. App. S.D. 1993); ***State v. Choate***, 884 S.W.2d 376, 378 (Mo. App. S.D. 1994). Consent is freely and voluntarily given if, considering the totality of all the surrounding circumstances, "the objective observer would conclude that the person giving the consent made a free and unconstrained choice to do so." ***State v. LaFlamme***, 869 S.W.2d 183, 187 (Mo.App. W.D. 1993); ***see also State v. Hyland***, 840 S.W.2d 219, 221 (Mo. banc 1992). In determining whether a consent search is valid and not the product of coercion, "[r]elevant factors include the number of officers present, the degree to which they emphasize their authority, whether weapons were displayed, whether the person was already in police custody, whether there was any fraud on the part of the police officers, the acts and statements of the consenter, and any other matter constituting the totality of the circumstances." ***State v. Engel***, 859 S.W.2d 822, 826 (Mo.App. W.D. 1993).

As can be seen from the above, the search that was conducted was based on appellant's free and voluntary consent to search. Cpl. Carson informed appellant that Mr. Ray was under arrest. Cpl. Carson asked appellant for consent to search the car (Tr. 10, 170). Appellant consented (Tr. 10). Cpl. Carson asked appellant to step out of the vehicle (Tr. 10). Cpl. Carson asked appellant if he would empty his pockets for him, and

appellant did so (Tr. 10, 26, 170). Appellant was not under arrest or being restrained when Cpl. Carson asked appellant whether he could search his vehicle and when Cpl. Carson asked appellant if he would empty his pockets (Tr. 15). Cpl. Carson did not display his weapon, there was no fraud by the officer and appellant freely and voluntarily consented to the search. Under the totality of the circumstances, appellant's consent was freely given, and Cpl. Carson was allowed to ask for permission to search the car and was allowed to ask appellant if he would empty his pockets because the encounter had become a consensual encounter.

Under the facts of this case, it was not clearly erroneous for the trial court to find that under the totality of the circumstances, appellant's consent to search was voluntarily given. The trial court could reasonably rely on the facts as presented during the hearing to find that the consent was voluntary and appellant did not offer any contrary evidence at the hearing to dispute the officer's testimony that the consent was voluntarily given. The trial court did not err.

For example, in ***State v. Middleton***, 43 S.W.3d 881, 886 (Mo.App.S.D. 2001), the Court of Appeals upheld the search when the officer asked the defendant to pull a Tylenol bottle out of his pocket, and eventually asked the defendant if the officer could get the bottle out of his pocket, and the defendant said yes. The Court of Appeals found this to be a consensual search, noting that "[c]onsent to search may be expressly given or it may be implied by a defendant's actions" and noting that there was no evidence of any

threats, coercion, or show of force by the law enforcement officer. The Court of Appeals deferred to the motion court's assessment of credibility and weighing of the evidence. ***Id.***

Appellant tries to distinguish ***Middleton*** by saying that Cpl. Carson did not get appellant's consent, but rather ordered him to empty his pockets (App.Br. 15). The record does not reflect an order by Cpl. Carson. Cpl. Carson testified at the motion to suppress hearing that he *asked* appellant *if he would* empty his pockets for Carson. This is a request, not an order. Nor does the record reflect any show of force or authority on the part of Carson in order to compel appellant to comply with Carson's request.

Appellant further argues that his case is like ***State v. Leavitt***, 993 S.W.2d 557, 563 (Mo.App.W.D. 1999). However, the cases are distinguishable. In ***Leavitt***, the totality of the circumstances demonstrate that the officer did not ask the defendant for consent to search. ***Id.*** Rather, he "told" the defendant to empty the contents of her pocket and "demanded" to see her makeup case several times as the defendant was reluctant to let him do so. ***Id.*** The defendant testified that she felt she had no choice to let the officer see her makeup case. ***Id.***

Such circumstances do not exist in the present case. The record reflects that Cpl. Carson "asked" appellant to empty his pockets. He did not "tell" him to or "demand" that he do so. There is no demonstration of any reluctance on the part of defendant. Cpl. Carson did not have to repeatedly demand appellant to empty his pockets. The totality of the circumstances in the present case, viewed in the light most favorable to the trial

court's ruling, demonstrate that appellant consented to emptying his pockets. The search was consensual, not compelled.

Appellant cites to cases such as ***State v. Taber***, 73 S.W.3d 699 (Mo.App.W.D. 2002) and ***State v. Weddle***, 18 S.W.3d 389 (Mo.App.E.D. 2000) to suggest that Cpl. Carson's continuing seizure of the car after his initial approach was not justified, nor taking the occupants' licenses and continuing the seizure after Cpl. Carson asked them why they had stopped in the road (App.Br. 15-16).

The cases are distinguishable. In ***Taber***, the officer determined, almost as soon as he stopped the defendant's car, that she had not violated the law and thus no longer had any reasonable suspicion to warrant detaining her. In ***Weddle***, the search was invalidated by the fact that the officer never had a reasonable suspicion that the defendant had committed a crime, but had merely received an anonymous tip that the defendant was passed out drunk in a car in a parking lot (in fact, defendant was asleep).

In appellant's case, however, appellant actually violated the law by not pulling to the shoulder when he stopped and by not driving carefully and prudently, in that he stopped in the middle of the road. Whatever appellant's excuse was for stopping in the middle of the road, it did not vitiate the illegality of his actions. Cpl. Carson always had a reasonable suspicion that appellant had performed an illegal act and this suspicion was never cancelled out by any viable explanation excusing appellant's behavior.

Appellant further argues that his continued "detention" after the arrest of his brother was illegal because the reason for the stop was over (App.Br. 20). Appellant cites to ***State v. Young***, 991 S.W.2d 173 (Mo.App.S.D. 1999) for the proposition that the arrest of the driver purportedly "does not justify the continued seizure of the passenger." (App.Br. 20). ***Young*** says nothing of the kind. The search of the passenger's wallet in ***Young*** was found to be impermissible because there were no exigent circumstances to justify the search as the state had claimed in that case. ***Id.*** at 177. The court further ruled that the state could not justify its search of the defendant based on what it had found in the truck because the state presented no evidence as to what it found in the truck. ***Id.*** at 178, 179.

Appellant also cites to ***State v. Martin***, 79 S.W.3d 912 (Mo.App.E.D. 2002) to support his assertion that he was not free to leave. However, ***Martin*** is also distinguishable from the present case because in ***Martin,*** the initial purpose of the stop was fulfilled. In ***Martin***, the deputy stopped the car because he could not see license plates on the vehicle. Once he stopped the vehicle, he saw temporary tags on the car. The purpose for his stop ended there, he no longer had reasonable suspicion that the driver or passengers was engaged in or had engaged in illegal activity, and thus he should have allowed the driver and her passengers to proceed on their way.

In appellant's case, however, Cpl. Carson still had a reasonable suspicion that appellant had engaged in illegal activity by failing to pull over to the side of the road and

by driving in a careless and imprudent manner. Unlike the situation in ***Martin*** or in ***Taber***, nothing had occurred to negate Cpl. Carson's reasonable suspicion that appellant had engaged in illegal activity.

In ***Ohio v. Robinette***, ***supra***, the officer stopped the defendant for speeding, asked for and received the defendant's driver's license, checked it and found no previous violations, and then asked the defendant to step out of the car, at which point he gave the driver a verbal warning and returned his license. 117 S.Ct. at 419. The officer then asked the defendant, "One question before you get gone: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?" ***Id.*** The defendant said no and the deputy asked if he could search the car. ***Id.*** The officer found marijuana and a pill determined to be MDMA.

The United States Supreme Court held that once a motor vehicle had been lawfully detained for a traffic violation, the officer may order the occupants out of the vehicle, subjective thoughts of the officer notwithstanding. ***Id.*** at 421.

In the present case, appellant's car was lawfully detained for a traffic violation; Cpl. Carson was well within the Fourth Amendment to ask appellant to step out of the car.

Moreover, Cpl. Carson had arrested appellant's brother and was entitled to search the car incident to the brother's arrest. ***New York v. Belton***, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2 768 (1981) holds that officers may search the car and containers therein

contemporaneously with the lawful arrest of the driver. ***See also State v. Bue***, 985 S.W.2d 386 (Mo.App.E.D. 1999). The fact that appellant may have been "detained" by the fact that Cpl. Carson was going to search the car pursuant to appellant's brother's arrest does not render that "detention" improper. ***See Maryland v. Wilson***, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997) (holding where valid stop of vehicle made, officers may order passengers out of car pending completion of stop); ***United States v. Sakyi***, 160 F.3d 164, 170 (4th Cir. 1998) (noting that passenger has already been stopped by virtue of the fact that the driver was lawfully stopped, so requiring passenger to remain at scene does not cause significant additional deprivation of personal liberty); ***People v. Gonzalez***, 689 N.E.2d 1187, 1192 (Ill.App. 1998) (finding that interest in officer safety is justification to permit officer to have control over movement of all occupants of legally stopped vehicle).

In short, the stop of appellant's vehicle was proper because appellant had violated traffic laws. Appellant's "detention" was based on the officer's reasonable suspicion that appellant had violated the law. That issue had not been resolved by the time the officer, having placed appellant's brother under arrest, asked appellant if he could search the car. Appellant consented to the search of the car and acquiesced to the officer's request that he empty his pockets. The totality of the circumstances do not demonstrate that appellant was compelled by the officer's authority to empty his pockets. Rather, the entire stop and

search was based on the officer's reasonable suspicion and on appellant's consensual response to the officer's request.

D. No prejudice.

Finally, even if there were anything improper about Cpl. Carson's search, appellant is not entitled to a reversal because appellant took the stand at trial and admitted to the conduct in question by admitting that he had the pill in his possession. When a defendant voluntarily testifies in his or her case and admits committing the crime, this voluntary testimony amounts to a confession, and the evidence the defendant sought to suppress is cumulative and therefore harmless. ***State v. Patino***, 12 S.W.3d 733, 740 (Mo.App.S.D. 1999); ***State v. McDaniel***, 987 S.W.2d 444, 446 (Mo.App.S.D. 1999); ***State v. Pate***, 859 S.W.2d 867, 870 (Mo.App.S.D. 1993).

Moreover, appellant did not object to any testimony by Cpl. Carson regarding the fact that the pill was found on appellant's person or appellant's statements to Cpl. Carson to the effect that appellant believed the pill was Xanax, which is a controlled substance, and that he took the pill from his brother's cigarette pack when he saw his brother being arrested (Tr. 170-171, 173, 175). Nor did appellant object to the testimony of Matthew Barb, the Highway Patrol chemist, who tested the pill and determined that it was diazepam, a controlled substance. Nor did appellant make a relevant objection to the

admission of State Exhibit 2, Barb's written report as to his findings.[1] Nor did appellant object to the testimony of Russell Duckworth that the pill was discovered when appellant emptied his pockets, that appellant told Cpl. Carson that when he saw his brother being arrested, he took the pill that he knew was in the cigarette pack and put it in his pocket, that appellant said he believed it was Xanax, and that appellant said that his grandmother had given the pill to his brother (Tr. 198, 202).

Appellant's only objection was a continuing objection lodged prior to trial as to State's Exhibit 1, the actual pill. Appellant's objection was, as follows:

> Whatever the exhibit number is of the appeal [sic] of the diazepam, we object to introduction of that into evidence Judge because the exhibit was obtained in violation of defendant's constitutional rights and that the search of the defendant and the seizure of the exhibit, the diazepam pill,

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[1]Appellant said that he felt that part of the report should be redacted, but said, "he's already testified as to what his opinion is and this is just another way of the state reaffirming what his opinion is and technically I think it's hearsay." (Tr. 187).

> were in violation of the rights of the defendant under the 4th and 14th amendment of the United States Constitution, Article 3, Section 10 of the Missouri Constitution. There was no warrant issued under probable cause and there was no other exceptions to the warrant present at the time of the search and seizure.

(Tr. 69).

The trial court then reiterated for the record that appellant had "a continuing objection to the introduction of the evidence of diazepam, whatever that exhibit is, and it will continue throughout the trial." (Tr. 70).

Thus, the record demonstrates that appellant's only objection was a continuing one as to State's Exhibit 1. Appellant made no other objection.

Even on appeal, appellant's only complaint is that the trial court erred in admitting the diazepam pill (App.Br. 14). Appellant's Point Relied On for Point I states that "The Trial Court erred in admitting evidence seized from the Appellant's person, the diazepam pill." Appellant's Point Relied On as to Point II also faults "The decision of the trial court to admit the pill" (App.Br. 26).

Thus, even if the trial court erred in admitting the pill, there was ample evidence of appellant's guilt absent the pill itself, including appellant's own testimony, Cpl. Carson's and Agent Duckworth's testimony that Carson found the pill when appellant emptied his pockets and that appellant told him he believed it was Xanax and that he had

taken the pill from his brother's cigarette pack and put it in his pocket when he saw his brother was being arrested, and the testimony of the Highway Patrol chemist. In fact, even if the pill had been suppressed and appellant had not testified, there would have been ample evidence of appellant's guilt from the testimony of Cpl. Carson, Agent Duckworth, and the Highway Patrol chemist. Therefore, any error as to admission of the pill was harmless.

Appellant, in Point II of his brief, argues that the State, in raising the harmless error argument in the previous paragraphs "has claimed the Appellant waived his constitutional right to be free from unreasonable searches and seizures by taking the witness stand and confessing." (App.Br. 26). That is not the state's argument. The state's argument is that even if the trial court did err in admitting evidence obtained during the stop, that error was harmless beyond a reasonable doubt since the evidence was merely cumulative to other evidence which came in when appellant testified. ***State v. Pate***, ***supra***.

The Court of Appeals, Southern District, in ***State v. Pate,*** relied on ***Motes v. United States***, 178 U.S. 458, 20 S.Ct. 993, 44 L.ED. 1150 (1900) in reaching its conclusion. In ***Motes***, the United States Supreme Court held that testimony of a witness was improperly received because it violated the defendant's Sixth Amendment rights, but the Supreme Court did not overturn Motes's conviction because Motes's trial testimony amounted to a confession. As the United States Supreme Court said, "It would be trifling

with the administration of the criminal law to award [Motes] a new trial because of a particular error committed by the trial court, when in effect he has stated under oath that he was guilty of the charge preferred against him." 20 S.Ct. at 1000.

The Eighth Circuit Court of Appeals cases has held similarly. ***See, e.g., United States v. Hill***, 864 F.2d 601 (8th Cir. 1988) (any error in admitting weapons seized from defendant's car harmless where defendant admitted that he possessed weapons); ***U.S. v. Leichtling***, 684 F.2d 553 (8th Cir. 1982) (even if evidence improperly seized from defendant's trunk and office, error was harmless when evidence was cumulative).

Appellant argues that he did not confess, arguing specifically that he denied knowing the pill was a controlled substance (App.Br. 27-28). This assertion is of no consequence since there is ample evidence that appellant *did* know the pill was a controlled substance. Cpl. Carson testified that appellant told him that he believed the pill was Xanax. The very fact that appellant took the pill out of his brother's cigarette package and hid it in his pocket shows that appellant believed that the pill was illegal in nature. ***See, e.g., State v. Camerer***, 29 S.W.3d 422 (Mo.App.S.D. 2000) (act of tossing a backpack containing pseudoephedrine undergoing conversion to methamphetamine from a truck was sufficient evidence of defendant's knowledge as to contents of backpack); ***State v. Elmore***, 43 S.W.3d 421, 427 (Mo.App.S.D. 2001) (ample circumstantial evidence that defendant knew of presence of methamphetamine including evidence that defendant threw a bag of methamphetamine out of car window while being chased by

police); ***State v. Jackson,*** 806 S.W.2dat 428 ("Evidence of efforts by a defendant to conceal a controlled substance is sufficient circumstantial evidence of knowledge to raise a question for the jury").

Appellant also argues that cases such as ***Pate*** and ***Patino*** should not be applied to him because his testimony was essentially coerced in that the State was allowed to put the diazepam pill into evidence (App.Br. 29-30). Appellant's testimony was not coerced. Appellant elected to testify. If appellant was firm in his belief that the pill was inadmissible, he could have elected not to testify and simply brought an appeal on the grounds that the pill was inadmissible. ***See, e.g., State v. McCullum***, 63 S.W.3d 242, 260 (Mo.App.S.D. 2001); ***State v. Johnson***, 901 S.W.2d 60, 62 (Mo.banc 1995). And in any event, there was ample evidence of appellant's guilt even without his testimony, as explained above.

Appellant argues that this Court should review the law relied on in cases such as ***Pate*** and ***Patino***. Appellant asserts that "The post hoc justification runs afoul of the principals of the exclusionary rule." (App.Br. 32). Appellant misconstrues the law. ***Pate*** and ***Patino*** and their ilk do not provide a post hoc justification of an otherwise illegal search. These cases simply say that any error is harmless because even if the evidence in question had been suppressed, there was still ample evidence of the defendant's guilt.

Appellant argues that his trial testimony was fruit-of-the-poisonous tree (App.Br. 32). Appellant cites no authority for the proposition that defendant's testimony, which

defendant chose to put on after making a strategic decision, can be considered fruit-of-the-poisonous-tree. According to Black's Law Dictionary, the fruit of the poisonous tree doctrine is that evidence which is spawned by or directly derived from an illegal search or illegal interrogation is generally inadmissible against the defendant. Thus, appellant's argument would appear to be that his own testimony was inadmissible against himself. Yet appellant chose to put on his own allegedly inadmissible testimony.

The bottom line is that appellant cannot complain about the effect of his own testimony which he opted to put on. What's more, in the present case, there was still ample evidence to convict appellant even absent the pill, which is all the appellant sought to suppress, and absent appellant's testimony.

In sum, the trial court did not err in failing to suppress admission of State's Exhibit 1, the diazepam pill, because the pill was discovered pursuant to a consensual search. In any event, even if the pill should have been suppressed, any error was harmless because there was ample evidence of appellant's guilt even without the pill, the pill being merely cumulative to other evidence of appellant's guilt. Appellant's claim is without merit and should be denied.

II.

THE TRIAL COURT DID NOT ERR IN DECLINING TO GRANT A CONTINUANCE TO APPELLANT SO THAT A PHARMACIST COULD TESTIFY ON APPELLANT'S BEHALF THAT APPELLANT'S GRANDMOTHER, WITH WHOM HE LIVED, HAD A PRESCRIPTION FOR DIAZEPAM BECAUSE THIS TESTIMONY WAS NOT RELEVANT TO THE CASE IN THAT APPELLANT WAS NOT ENTITLED TO THE AFFIRMATIVE DEFENSE OF LAWFUL POSSESSION BECAUSE HIS GRANDMOTHER'S PRESCRIPTION DID NOT MAKE IT LEGAL FOR APPELLANT TO POSSESS THE DIAZEPAM WHERE HE HAD NOT RECEIVED IT PURSUANT TO THE PRESCRIPTION AND DID NOT POSSESS IT FOR USE BY HIMSELF OR HIS GRANDMOTHER (In response to appellant's Point IV).

Appellant contends that the trial court erred in overruling his motion for continuance in order to obtain the testimony of a pharmacist who would testify that appellant's grandmother had a prescription for diazepam (App.Br. 21). Appellant asserts that his defense was that the diazepam had been prescribed to a member of his household, namely, his grandmother (App.Br. 21).

A. Facts.

During pretrial, defense counsel announced that they had subpoenaed a witness, Brenda Lunsford, a pharmacist from K-Mart, who could not be there (Tr. 57, 60).

Defense counsel had a written affidavit from the witness (Tr. 57). Defense counsel explained that the witness's husband had suffered a heart attack and he was being transferred that morning to Memphis for an emergency procedure (Tr. 58). The witness would have testified that she was a pharmacist at K-Mart pharmacy and that Mrs. Alice Ellis had the prescription for diazepam filled at or near the time of defendant's arrest, that appellant was Alice Ellis's grandson, and he lived in the same household with his grandmother (Tr. 63-64). The state observed that they had never been notified of the witness at all (Tr. 61).

Ultimately the court overruled appellant's motion for continuance due to unavailability of a witness (Tr. 63). Appellant also wished to put into evidence the affidavit to establish a foundation for putting in the K-mart Pharmacy records establishing that Alice Ellis had a prescription for Diazepam (Tr. 63-64). The court sustained the state's objection to the affidavit and records on the grounds that they were not relevant to any issue of the defense (Tr. 65). Appellant entered the affidavit with attached pharmacy records of Alice Ellis as an offer of proof (Tr. 67).

During his case-in-chief, appellant testified that he lived with his grandparents (Tr. 207). Appellant said that he and his brother had been at the house and appellant's grandmother had given his brother Cary a diazepam pill "to calm his nerves down." (Tr. 213). Appellant asserted he was driving his brother to Hillsboro when they were stopped (Tr. 209). Appellant said that because his brother had been arrested and his brother had

drug problems, appellant took the pill out of his brother's cigarette package laying on the console of the vehicle and put the pill in his pocket, in hopes of protecting his brother (Tr. 212).

B. Standard of review.

"The decision to grant or deny a continuance is within the sound discretion of the trial court." ***State v. Schuster***, 92 S.W.2d 816,819 (Mo.App.S.D. 2003). "A very strong showing is required to prove abuse of that discretion." ***Id.*** "The party requesting the continuance bears the burden of showing both an abuse of discretion, and prejudice stemming from the court's denial." ***Id***.

C. Analysis.

The trial court did not err in denying to grant a continuance for appellant on the grounds of an unavailable witness because the witness in question had nothing relevant to say. While appellant maintains that the witness was crucial to his defense, the fact is that the "defense" appellant wished to pursue was not viable.

Appellant wanted to assert what he calls in his brief the "ultimate user" defense (App.Br. 51). Appellant cites to no Missouri caselaw that suggests that such a defense exists. The "defense," as respondent understands it, is that appellant allegedly could lawfully possess the diazepam because it had been prescribed to a member of his household. Appellant cites to §195.180, which describes the affirmative defense of "lawful possession" and to §195.010(40), RSMo 2002 which defines "ultimate user."

Contrary to appellant's belief, these statutes do not excuse appellant's possession of the diazepam.

Appellant's claim of defense is essentially lawful possession. Section 195.180, RSMo 2000 describes this affirmative defense, in pertinent part, as follows:

> 1. A person may lawfully possess or have under his control a controlled substance if such person obtained the controlled substance directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of a practitioner's professional practice or except as otherwise authorized by sections 195.005 to 195.425.

Appellant did not obtain the diazepam directly from, or pursuant to, a valid prescription or order of a practitioner. He received it by taking it from his brother's cigarette package. His own brother did not obtain the diazepam directly from, or pursuant to, a valid prescription or order of a practitioner. If one is to believe appellant's testimony, his brother got it from their grandmother. Appellant's grandmother, even if she had received the diazepam pursuant to a valid prescription, did not have the authority to dispense her prescription medication to anyone else for their use. In short, while appellant's grandmother's prescription made it legal for grandmother to possess the

diazepam, it did not grant her the authority to legally transfer the drug to anyone else.[2] ***See, e.g.,*** §195.100.3, RSMo 2000 (stating that when controlled substances are dispensed to or for a patient, they must carry warning that it is a criminal offense to transfer such narcotic or dangerous drug to any person other than the patient). Thus, there are no facts which demonstrate that appellant obtained the diazepam directly from, or pursuant to a prescription or order of a practitioner and thus, no evidence to support a defense of lawful possession.

Appellant also relies on §195.010(40), RSMo 2002, which defines "ultimate user" to suggest that he was entitled to hold the pill. First of all, respondent notes that "ultimate user" is only a definition, not a defense. To the extent this could possibly be construed to provide a defense, respondent notes that Section 195.080 also states that a person may lawfully possess a controlled substance if "otherwise authorized by sections 195.005 to 195.425" and that Section 195.030.4(3) states that "ultimate user" may lawfully possess controlled substances. Section 195.010(40) defines an "ultimate user" as a person who lawfully possesses a controlled substance for his own use or for the use of a member of his household or for administration to an animal owned by him or by a

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[2]Thus, appellant's hypothetical situation wherein members of a household share prescription medications, while perhaps reflecting a common practice, does demonstrate illegal conduct.

member of his household. Of course, in order to "lawfully possess," one must possess or control either directly from, or pursuant to, a prescription or practitioner's order, per §195.180 and §195.060.1, which states that controlled substances may be sold or dispensed only upon a prescription of a practitioner as authorized by statute.

These statutes do not assist appellant because appellant does not fall within the terms of the definition of "ultimate user."

An "ultimate user" is "a person who lawfully possesses a controlled substance or an imitation controlled substance for his own use or for the use of a member of his household or for administering to an animal owned by him or by a member of his household." The only part of this definition appellant meets is that he is a person. The rest of the definition excludes him entirely.

First of all, to be an ultimate user, one must be a person who "lawfully possesses a controlled substance." As already discussed above, appellant has not shown that he lawfully possessed the diazepam because he did not receive the diazepam directly from or pursuant to a valid prescription or order of a practitioner.

Secondly, under the definition of "195.010(40), an "ultimate user" must lawfully possess the controlled substance for *his own use* or *the use of a member of his household* or *for administering to animal owned by him or by a member of his household.* Appellant did not possess the pill for his own use. He did not possess the pill for the use of his grandmother, who was the only person entitled to use the pill pursuant to the prescription,

and there is no suggestion whatsoever that appellant possessed the pill for administration to any animal whatsoever.

In short, the definition of "ultimate user" does not purport to grant blanket authority to anyone in a household to do whatever he or she pleases with any prescription drug within the household. The definition of "ultimate user" presupposes that the person has obtained the drug via a valid prescription for either his use, the use of his family member, or for treatment of an animal owned by the household. Appellant fits none of these criteria.

Thus, even if appellant's evidence as to how the pill came into his possession is true, it would not entitle him to an instruction on the affirmative defense of lawful possession because the evidence does not demonstrate that appellant obtained the pill pursuant to a valid prescription The testimony of the unavailable witness to the effect that appellant's grandmother had a prescription for diazepam would have done nothing to support a defense for appellant under the circumstances of this case. The trial court cannot be deemed to have abused its discretion where there is no showing that a different result would have occurred had the absent witnesses testified and the purported testimony had no direct bearing on the issue of appellant's guilt or innocence. ***State v. Lynch***, 528 S.W.2d 454, 457 (Mo.App.St.L.Dist. 1975). Appellant's claim is without merit and should be denied.

III.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S TENDERED INSTRUCTIONS A AND B WHICH PURPORTED TO SUBMIT THE "ULTIMATE USER" DEFENSE BECAUSE APPELLANT WAS NOT ENTITLED TO INSTRUCTIONS IN THAT THERE WAS NO EVIDENCE TO SUPPORT THEIR SUBMISSION (In response to appellant's Point V).

Appellant contends that the trial court erred in denying to give appellant's tendered instructions A and B, which would have purported to submit what appellant characterizes as "the ultimate user defense" to the jury.

A. Facts.

During his case-in-chief, appellant testified that he lived with his grandparents (Tr. 207). Appellant said that he and his brother had been at the house and appellant's grandmother had given his brother Cary a diazepam pill "to calm his nerves down." (Tr. 213). Appellant asserted he was driving his brother to Hillsboro when they were stopped (Tr. 209). Appellant said that because his brother had been arrested and his brother had drug problems, appellant took the pill out of his brother's cigarette package laying on the console of the vehicle and put the pill in his pocket, in hopes of protecting his brother (Tr. 212).

Appellant also wished to present the testimony of a pharmacist who would have asserted that appellant's grandmother had a valid prescription for Diazepam. See Respondent's brief, Point II, ***supra***.

The instructions appellant tendered read as follows:[3]

INSTRUCTION NO. A

One of the issues is whether the controlled substance found on the defendant was a prescribed medication for a member of his household. In this state, it is lawful to possess a controlled substance if it has been prescribed for a member of your household.

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[3]Supreme Court Rule 84.05(e) states that if a point relates to the refusal to give an instruction, such instruction shall be set forth in full in the argument portion of the brief. The exception to this is if the instruction is included in the appendix, pursuant to Supreme Court Rule 84.05(h)(3). Appellant has done neither.

On the issue of the lawful possession of a controlled substance prescribed to a member of the defendant's household you are instructed as follows:

First, if Alice Ellis had a prescription for Diazepam, and

Second, if Alice Ellis was a member of the defendant's household,

then you must find the defendant not guilty of possessing a controlled substance.

(LF 19). Appellant acknowledges that this instruction does not exist in MAI-CR3d, but was allegedly based on §195.010 & MAI-CR3d 304.11 and 304.02, and modeled after MAI-CR3d 306.12.

INSTRUCTION NO. B

If you find and believe from the evidence beyond a reasonable doubt:

First, that on the 25th day of August, 1999, in the County of Wayne, State of Missouri, the defendant possessed diazepam, a controlled substance, and

Second, that defendant knew or was aware of its presence and illegal nature, and

> Third, that the controlled substance was not prescribed to a family member as submitted in Instruction No. A, then you will find the defendant guilty of possession of a controlled substance.

(LF 20). Essentially, this instruction is the verdict director for possession of a controlled substance, plus a paragraph referencing what appellant considers to be the affirmative defense (LF 21).

Appellant contends that the trial court had to give these instructions because there was substantial evidence to support them. "For an affirmative defense to be submitted to the trier of fact, it must be supported by evidence." ***State v. Frezzell***, 958 S.W.2d 101, 105 (Mo.App.W.D. 1998).[4] "A defendant is entitled to an instruction on any theory of his case that tends to be established by the evidence, no matter the source." ***Id.*** Thus, the question is whether there was sufficient competent evidence to require giving appellant's instructions. ***Id.*** There was not because the evidence at trial did not demonstrate that appellant was entitled to the affirmative defense of lawful possession or, as he refers to it, the "ultimate user" defense.

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[4]Lawful possession of a controlled substance is an affirmative defense under §195.180.2, which states that the burden of proof of such exception shall be on the defendant. See §556.056, RSMo.

The "defense," as respondent understands it, is that appellant allegedly could lawfully possess the diazepam because it had been prescribed to a member of his household. Appellant cites to §195.180, which describes the affirmative defense of "lawful possession" and to §195.010(40), RSMo 2002 which defines "ultimate user." Contrary to appellant's belief, these statutes do not excuse appellant's possession of the diazepam.

Appellant's defense is lawful possession. Section 195.180, RSMo 2000 describes this affirmative defense, in pertinent part, as follows:

> 1. A person may lawfully possess or have under his control a controlled substance if such person obtained the controlled substance directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of a practitioner's professional practice or except as otherwise authorized by sections 195.005 to 195.425.

The evidence in this case does not show that appellant obtained the diazepam directly from, or pursuant to, a valid prescription or order of a practitioner. Rather, he received it by taking it from his brother's cigarette package. Nor did appellant's brother obtain the diazepam directly from, or pursuant to, a valid prescription or order of a practitioner. If one is to believe appellant's testimony, his brother got it from their grandmother. Appellant's grandmother, even if she had received the diazepam pursuant to a valid prescription, did not have the authority to dispense her prescription medication

to anyone else for their use. In short, while appellant's grandmother's prescription made it legal for grandmother to possess the diazepam, it did not grant her the authority to legally transfer the drug to anyone else. ***See, e.g.,*** §195.100.3, RSMo 2000 (stating that when controlled substances are dispensed to or for a patient, they must carry warning that it is a criminal offense to transfer such narcotic or dangerous drug to any person other than the patient). Thus, there are no facts which demonstrate that appellant obtained the diazepam directly from, or pursuant to a prescription or order of a practitioner and thus, no evidence to support a defense of lawful possession.

Appellant also relies on §195.010(40), RSMo 2002, which defines "ultimate user" to suggest that he was entitled to hold the pill. First of all, respondent notes that "ultimate user" is only a definition, not a defense. To the extent this could possibly be construed to provide a defense, respondent notes that Section 195.080 also states that a person may lawfully possess a controlled substance if "otherwise authorized by sections 195.005 to 195.425" and that Section 195.030.4(3) states that an "ultimate user" may lawfully possess controlled substances. Section 195.010(40) defines an "ultimate user" as a person who lawfully possesses a controlled substance for his own use or for the use of a member of his household or for administration to an animal owned by him or by a member of his household. Of course, in order to "lawfully possess," one must possess or control either directly from, or pursuant to, a prescription or practitioner's order, per §195.180 and §195.060.1, which states that controlled substances may be sold or

dispensed only upon a prescription of a practitioner as authorized by statute. In any event, the definition of "ultimate user" does not assist appellant because appellant does not fall within the terms of the definition of "ultimate user."

An "ultimate user" is "a person who lawfully possesses a controlled substance or an imitation controlled substance for his own use or for the use of a member of his household or for administering to an animal owned by him or by a member of his household." The only part of this definition appellant meets is that he is a person. The rest of the definition excludes him entirely.

First of all, to be an ultimate user, one must be a person who "lawfully possesses a controlled substance." Appellant has not shown that he lawfully possessed the diazepam because, as explained above, he did not receive the diazepam directly from or pursuant to a valid prescription or order of a practitioner.

Secondly, under the definition of 195.010(40), an "ultimate user" must lawfully possess the controlled substance for *his own use* or *the use of a member of his household* or *for administering to an animal owned by him or by a member of his household.* Appellant did not possess the pill for his own use. He did not possess the pill for the use of his grandmother, who was the only person per prescription entitled to use the pill, and there is no suggestion whatsoever that appellant possessed the pill for administration to any animal whatsoever.

In short, the definition of "ultimate user" does not purport to grant blanket authority to anyone in a household to do whatever he or she pleases with any prescription drug within the household. The definition of "ultimate user" presupposes that the person has obtained the drug via a valid prescription for either his use, the use of his family member, or for treatment of an animal owned by the household. Appellant fits none of these criteria. Thus, there was no evidence that appellant was an ultimate user of the diazepam.

Finally, even if appellant were somehow entitled to this defense, his instructions were not properly drafted. Appellant wished to submit an affirmative defense, pursuant to §195.180.2 and §556.056. Appellant's Instruction B, the proposed verdict director, was improper in its handling of the affirmative defense because it simply added the affirmative defense as a paragraph to the verdict director. This might be proper if the defense were a special negative defense. But in the case of affirmative defenses, the "unless" clause of the verdict director should simply cross-reference the separate instruction for the affirmative defense. See MAI -CR3d 304.11. The trial court cannot be found to have erred for refusing to give an improper instruction. ***State v. Kiser***, 959 S.W.2d 126, 130 (Mo.App. S.D. 1998) ("A trial court does not err when it rejects an improper instruction.").

In sum, since appellant does not fall within the terms of the lawful possession defense, he was not entitled to an instruction on this affirmative defense. The trial court

thus did not err in refusing to submit appellant's instructions A and B to the jury. Appellant's claim is bereft of merit and should be denied.

IV.

THE TRIAL COURT DID NOT ERR IN DETERMINING THAT APPELLANT DID NOT HAVE FACTS WHICH DEMONSTRATED A VALID DEFENSE UNDER CHAPTER 195 BECAUSE APPELLANT DID NOT HAVE A DEFENSE UNDER THE PLAIN LANGUAGE OF THE RELEVANT STATUTES IN THAT APPELLANT DID NOT POSSESS THE PILL DIRECTLY FROM OR PURSUANT TO A VALID PRESCRIPTION FOR HIS OWN USE OR THE USE OF A HOUSEHOLD MEMBER. (In response to Appellant's Point III).

Appellant contends that "The trial court erred in concluding that the law prohibits sole possession of a drug by anyone other than the prescription holder and denying the Appellant's requested continuance and jury instructions." (App.Br. 39).

Supreme Court Rule 83.08(b) states that a substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." If one takes appellant's Point Relied On at face value, it might appear that he has altered the basis of his claim in that he is now claiming that the trial court erred in concluding that the law prohibits sole possession of a drug by anyone other than the prescription holder. Appellant did not assert this as a claim of error below before the Court of Appeals, Southern District.

Respondent believes, however, that what appellant is actually trying to do is respond to respondent's argument in Points II and III, ***supra***, to the effect that appellant does not have a defense under §195.180. Respondent feels it unnecessary to again

reiterate the argument it has already made twice in the proceeding points but, in an abundance of caution, respondent will briefly address appellant's assertions in Point III of his brief.

As near as respondent can tell, appellant's argument appears to be that the State has somehow misinterpreted the plain language of §195.180.1 (App.Br. 40). Once again, that statute reads as follows:

> A person may lawfully possess or have under his control a controlled substance if such person obtained the controlled substance directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of a practitioner's professional practice or except as otherwise authorized by sections 195.005 to 195.425.

The primary rule of statutory construction is to determine and give effect to the intent of the legislature. ***State v. Withrow***, 8 S.W.3d 75, 79-80 (Mo.banc 1999). The court, in doing so, gives the words used in the statute their plain and ordinary meaning. ***State v. Grubb***, 120 S.W.3d 737, 739 (Mo.banc 2003).

Respondent has already demonstrated, twice, how appellant's behavior is not excused by the plain and ordinary language of Chapter 195. Appellant, however, asserts that the state's interpretation of the language is too narrow and leads to absurd results.

Indeed, despite appellant's profession of dislike for "claims of Kafkaesque nightmares," (App.Br. 41), appellant spends a good portion of his argument describing

hypothetical problems which he asserts would result under the state's alleged interpretation of §195.180, wherein husbands or wives could be convicted for possession of a controlled substance because their spouse's prescription medication was in their joint medicine cabinet (App.Br. 41), or wherein parents would risk a conviction because they have in their possession a prescription for their child (App.Br. 42, 49). Appellant goes so far as to suggest (tongue-in-cheek, one presumes) that the State's position is that "the General Assembly intended to outlaw medicine cabinets." (App.Br. 41). Appellant asserts that "it seems unlikely that the legislative intent behind §195.180 was to outlaw medicine cabinets or to require people living with others to retain sole possession of their medications by keeping them on their person." (App.Br. 41).

Respondent agrees that it is unlikely that the legislature intended to outlaw medicine cabinets. However, there can be no doubt that the legislature intended to outlaw the appropriation of another person's prescription medication – that is, a controlled substance – whether that appropriation was from a medicine cabinet or the prescription holder's purse or, as in this case, from the cigarette package of one's brother, who was not the prescription holder and who himself had no legal right to hold, possess, or control the diazepam pill for his own use.

Appellant notes that he is "mindful of the fact that cases are decided on their facts" (App.Br. 41) yet spends the remainder of the argument on this "point" discussing hypothetical situations that do not remotely resemble the facts actually at issue in this

case. Indeed, appellant makes no argument in this "point" as to how the facts in this case fall under the plain language of §195.180.

Again, the facts in this case are, assuming, for the sake of argument, that appellant's version of the story is true, appellant's grandmother had a prescription for diazepam. Grandmother gave appellant's brother a diazepam pill for him to take. Appellant subsequently took the pill out of his brother's cigarette package when he saw his brother being arrested in order to protect his brother.

These facts do not bring appellant within the plain language of §195.180. True, appellant possessed the pill when he put it in his pocket. Appellant had the pill under his control when he put it in his pocket. But, as respondent has already said in Points II and III, ***supra***, appellant did not obtain the diazepam pill directly from a valid prescription or order of a practitioner. Appellant did not fill the prescription. Appellant did not pick up the prescription. The prescription was not for appellant.

Nor did appellant take possession or obtain control of the pill "pursuant to" a valid prescription or order of a practitioner. "Pursuant to" means "in conformance to" or "according to." BLACK'S LAW DICTIONARY at 1237; Webster's New Collegiate Dictionary (1982). Appellant did not possess or control the pill in conformance to or according to the prescription because the pill was not prescribed for him and the prescription did not in any way authorize appellant to take possession or exercise control

over the pill by taking it out of his brother's cigarette package in order to conceal it from law enforcement.

Section 195.080 also states that a person may lawfully possess a controlled substance if "otherwise authorized by sections 195.005 to 195.425." Section 195.030.4(3) states that an "ultimate user" may lawfully possess controlled substances. Section 195.010(38) defines an "ultimate user" as a person who lawfully possesses a controlled substance for his own use or for the use of a member of his household or for administration to an animal owned by him or by a member of his household. Of course, in order to "lawfully possess," one must possess or control either directly from, or pursuant to, a prescription or practitioner's order, per §195.180 and §195.060.1, which states that controlled substances may be sold or dispensed only upon a prescription of a practitioner as authorized by statute.

Reading these provisions together addresses appellant's concerns about spouses, parents, children, etc. For example, Mr. Smith goes to Walgreens and picks up a prescription for diazepam, a Schedule IV controlled substance, for his daughter, who lives in his household. Mr. Smith may lawfully possess because he is an "ultimate user" in that he possesses the drug for the use of a member of his household and he lawfully possesses the drug because he took possession/control of the drug directly from or

pursuant to a valid prescription.[5] This is precisely how the Southern District interpreted the statutes. ***State v. Blocker***, No. SD25003, *slip op.* at 6 (Mo.App.S.D. October 28, 2003).

Appellant's arguments notwithstanding, respondent has *never* suggested or asserted that situations such as that set out in the preceding paragraph constitute criminal behavior. Respondent has *never* given §195.180 or §195.010(40) the crabbed reading that appellant suggests in his brief.

Rather, the fact remains that appellant's situation simply *does not meet* the criteria for lawful possession of controlled substance under Chapter 195. Appellant does not even argue how he does meet these criteria. Rather, appellant simply does not meet the definition of "ultimate user" because appellant does not claim to have possessed or controlled the pill for his use, and he did not possess or control the pill for the use of someone in his household or for an animal owned by him or someone in his household.

Appellant did not obtain the pill directly from a prescription. He did not obtain the pill pursuant to the prescription because appellant's possession of the pill was not "in accordance with" or "in conformance to" the prescription. It was not his prescription, and

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[5]This should also sufficiently answer appellant's hypothetical questions, "Why can an individual pick-up his or her spouse's or child's prescription?" and "Why don't individuals have to surrender prescriptions to three year-old's?" (App.Br. 46).

he was not picking up a prescription for a household member. Appellant did not take possession of the pill in order to return it to his grandmother. Nor was appellant in joint control of the pill with his grandmother at his grandmother's house when the pill was discovered in his possession. Appellant does not fit any of the hypothetical situations that he argues should be permissible under the statute.

On the contrary, if one believes appellant's testimony, appellant took the pill out of his brother's cigarette package for the sole purpose of hiding it from law enforcement officers so that his brother would not get in more trouble than he already was. Nowhere in Chapter 195 does it say that it is lawful to take possession or control of a controlled substance in order to hide the controlled substance from law enforcement officers. No plain language says that it is a defense to possession of a controlled substance that one took possession in order to conceal the drug so as to protect one's sibling. No plain language in Chapter 195 states that once a household member obtains a pill via a valid prescription, anyone else in the household can do as they wish with the pill.

In short, the fact that someone in appellant's household had a prescription for the diazepam pill in his possession at the time did not excuse his behavior under the plain language of §195.180, 195.010(38) , and 195.030. Appellant's claims are without merit and should be denied.

CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of March, 2004.

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IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

BILLY LYNN BLOCKER,

Appellant.

Appeal from the Circuit Court of Iron County, Missouri
The Honorable J. Max Price, Judge

RESPONDENT'S APPENDIX

TABLE OF CONTENTS